SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 627

THOMAS C. CORNELL,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

MARC PAUL EDELMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ROY LISKER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 18, 1967.

Citations to Opinions Below

The opinion of the United States Court of Appeals is printed in the Appendix and is reported at —— F. 2d —— (July 18, 1967).

Jurisdiction

The judgment of the United States Court of Appeals was entered on July 18, 1967. On August 18, 1967, Mr. Justice Harlan issued an order extending the time in which to file this petition for a writ of certiorari up to and including September 16, 1967. The jurisdiction of this court is invoked under 28 U. S. C. §1254(1).

Questions Presented for Review

(1) Whether the amended statute, Universal Military Training and Service Act 1951, Title 50, App., U. S. C. §462(b), under which petitioners were indicted, which declares it to be a felony to knowingly destroy or knowingly mutilate any Selective Service System certificate, is unconstitutional on its face in that the legislative history of the amended statute unequivocally reveals that it was deliberately intended and enacted for the purpose of suppressing dissent in violation of the First Amendment.

(2) Whether the statute is unconstitutional as applied to the facts of this case because the form of conduct sought to be punished was a peaceful act of symbolic speech designedly conducted in an effective but constitutionally permissive manner which falls within the limits of expression protected by the First Amendment to the Federal Constitution.

(3) Whether the clear and present danger test, as opposed to the balancing test employed by this Court of Appeals, is the proper test to be employed in determining whether petitioners' acts of symbolic speech, in burning certain Selective Service System certificates, were protected by the First Amendment.

(4) Whether, assuming a balancing test is properly to be applied to the facts of this case, the fact that two of the three petitioners destroyed only their Registration Cards and not their Classification Cards so reduces the interest of the United States in preventing petitioners' acts of symbolic expression that the balancing test no longer justifies interference with First Amendment rights.

(5) Whether the fact that petitioners were variously classified as I-O and IV-F, and thus were then and are now presently ineligible for induction, so reduces the interest of the United States in preventing petitioners' acts of symbolic expression that the balancing test no longer justifies interference with First Amendment rights.

(6) Whether the statute under which petitioners were indicted is an unconstitutional deprivation of individual liberty without due process of law, contrary to the guarantee of substantive due process contained in the Fifth Amendment to the Federal Constitution, both on its face, and as applied to petitioners, in that the statute does not serve any rational legislative purpose.

Constitutional and Statutory Provisions Involved

This case involves the First and Fifth Amendments to the United States Constitution.

The statute involved is P. L. 89-152, 79 Stat. 586, enacted on August 30, 1965, which adds certain language to Section 12(b)(3) of the Act, 50 U. S. C. App. §462(b)(3), as follows:

> "(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be

falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

Statement of the Case

Petitioners were indicted in the United States District Court for the Southern District of New York on December 21, 1965. They were each charged with knowing destruction and mutilation of certain Selective Service System Certificates which had been issued to them, commonly known as Registration Certificates. Petitioner Cornell was also charged with the destruction and mutilation of a Notice of Classification. These facts were stipulated. Petitioners were charged, specifically, with violation of 50 U. S. C. App. §462(b)(3), as amended.

Petitioner Cornell was classified 1-O as a conscientious objector at the time he burned his card. Petitioners Edelman and Lisker at that time were classified 4-F. PA-5.*

* "PA" numbers refer to the Appendix of this Petition.

The central facts surrounding these acts of destruction and mutilation were summarized by the Court of Appeals:

> "[Petitioners] had burned these forms at a well-publicized rally in Union Square, New York City, on November 6, 1965 under the sponsorship of the Committee for Non-Violent Action. Prior to the destruction of his certificate, each [petitioner] made a statement to the effect that he was performing the act to protest the war in Vietnam as well as the law prohibiting draft card burning. Another man also burned his draft card, but was not indicted as he was over 36 and no longer subject to call for military duty, although the Government contends that one of the reasons for not indicting him was a lack of evidence.
>
> "[Petitioners] were tried before Judge Murphy, sitting without a jury, found guilty, sentenced to six-month prison terms and released pending this appeal." PA-2.

The amended statute under which petitioners were indicted became law on August 30, 1965. It was introduced in the House by Rep. Rivers on August 5, 1965. It was favorably reported by the House Committee on Armed Services on August 9, 1965. H. Rep. No. 747, 89th Cong., 1st Sess. The House Report states that the Committee was:

> "• • • aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards."

The next day, Cong. Rivers, the bill's sponsor, explained the purpose of the bill on the floor:

> "It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards." (Cong. Rec.—House, August 10, 1965, at 19135.)

The bill was enacted in the House on August 10, 1965 by a vote of 393 to 1. On the same day Sen. Thurmond introduced an identical bill in the Senate, stating that:

> "It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy." (Cong. Rec., August 10, 1965, at 19012.)

The report of the Senate Committee on Armed Services submitted on August 12, 1965, by Sen. Thurmond stated that the bill resulted from the Committee taking notice "of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy." Sen. Rep. No. 589, 89th Cong., 1st Sess. The bill passed the Senate that same day. It received Presidential approval on August 30, 1965.

Petitioners are not the first persons to be prosecuted under this amended statute, nor is this the first occasion this Court has been asked to examine the amended statute. David Miller was found guilty of knowingly destroying his Registration Card, *United States* v. *Miller*, 367 F. 2d 72 (2d Cir. 1966), cert. den., 386 U. S. 911 (1967), Justice Douglas dissenting. After the expiration of Miller's time to petition this Court for a rehearing, the Court of Appeals for the First Circuit, on facts similar to *Miller*, determined the amended statute to be unconstitutional.

O'Brien v. *United States*, 376 F. 2d 538 (1st Cir. 1967). The Government has filed a petition for certiorari in this Court, 35 L. W. 3439 (1967), and O'Brien has cross-petitioned for certiorari contesting the propriety of his conviction for non-possession of certain Certificates, 35 L. W. 3448 (1967). Subsequent to this, Miller applied to the Court for leave to apply for a rehearing in the light of *O'Brien*. The *O'Brien* and *Miller* Petitions are pending before this Court.

Reasons for Granting the Writ

Certiorari should be granted (1) because the Court of Appeals has decided important questions of Federal Constitutional law which should be settled by this Court, particularly since some of the reasoning of the Second Circuit is in conflict with applicable decisions of this Court and (2) because there presently exists a conflict among the various Courts of Appeals as to certain questions of law presented in this case. This conflict, raising substantial and important issues of the right to free speech under the First Amendment, can only be resolved by this Court.

I.

Clearly, should this Court determine to grant certiorari in *O'Brien* and/or permit a rehearing in *Miller*, the instant petition for certiorari should be granted in order that all pending draft card burning cases may be determined upon common principles of law.

Several of the arguments made in the *Miller* petition are present in the instant case. Briefly, they are:

1. The amended statute is unconstitutional on its face because the legislative history unequivocally re-

veals that it was deliberately enacted for the purpose of suppressing dissent. The entire legislative history is set forth in the appendix to the *Miller* petition. The court below, citing its earlier opinion in *Miller*, refused to give any further consideration to this argument.

2. The ceremonial burning of a draft card at a public meeting, for the purpose of dramatizing an anti-war, anti-draft speech, is symbolic speech within the meaning of the First Amendment and well within the outer limits of the clear and present danger test. Both the *Miller* court and the court below refused to apply the clear and present danger test, applying instead the *ad hoc* balancing test.

3. The amended statute, both on its face and as applied, is an unconstitutional deprivation of liberty without due process of law, since the statute serves no rational legislative purpose. The *Miller* court held that the statute fulfilled a legitimate role in the administration of the Selective Service System. Although the argument was again presented to the court below, it was not discussed in the opinion.

Especially in light of *United States* v. *O'Brien, supra,* petitioners again press these arguments on this Court. However, in the interest of brevity, they will not be repeated here.

II.

In addition, petitioners urge this Court to consider and resolve certain arguments not made in the *Miller* and *O'Brien* petitions. Unlike *Miller* and *O'Brien,* this case raises certain First Amendment arguments implicit in the

weighing of the amended statute in the application of any constitutionally authorized balancing test. These are raised in part by certain facts of constitutional dimension which are peculiar to this case.

If the balancing test is to be applied, then petitioners urge that the court below erred in its application of that test to the facts presented by this case. The *Miller* court developed an elaborate argument, ostensibly weighing all the various interests of the United States in preventing destruction of Selective Service System Certificates against Miller's interest in destroying one such Certificate, finding the latter clearly wanting. The Court of Appeals' opinion in the instant case contained no such elaborate an exercise, but referred to the *Miller* opinion design as a model.

Petitioners contend that the balancing test as applied is inadequate, and unpersuasive on its face, that the governmental interests outlined in *Miller* are in large part spurious, exaggerated or, in the final analysis, of benefit only to the individual registrant and not to the government. Petitioners believe that under any constitutionally tolerated formulation of the balancing test, the scales must tip toward petitioners' position; petitioners seek an opportunity to demonstrate to this Court the general irrelevance of the purported governmental interest in the balance.

For example, petitioners call to the attention of the Court the fact that the amended statute makes no distinction between the destruction of a currently valid Classification Notice and the destruction of a superseded Notice. The Government has no possible interest in forbidding the destruction of a no longer valid Certificate, save suppression of dissent. Such a suppressive interest is clearly of no weight in the balancing test.

David Miller was indicted for destroying his Notice of Classification. The court, in *Miller,* only addressed itself to the public interest in preventing the destruction of Notices of Classification. Petitioners Edelman and Lisker are only charged with the destruction of their Registration cards, and not of their Notices of Classification.

Petitioners contend that the Notice of Classification is by far the more important document. It alone states what a registrant's classification is. It shows the registrant's registration number, as does the Registration card. As noted by the court in *Miller,* the Classification certificate itself serves as proof of registration. The Registration card does contain certain data which does not appear upon the Notice of Classification, such as the registration's date and place of birth, the color of his hair and his eyes, and his height and weight *at the time of registration.* This date is surely of minor significance. Placed within the balancing test, the Registration card is surely less weighty than the Classification Notice.

Petitioners argue that no very important public end is achieved by prohibiting the destruction or mutilation of a Registration card, as distinguished from a Notice of Classification, and as distinguished from requiring possession of such card. Even if there be some minimal purpose so served, petitioners believe it is wholly insufficient to overbalance their interest in self-expression.

The Court of Appeals brushed this distinction aside, stating:

> It would be most arbitrary to rule that the amendment was constitutional with respect to one document but not with respect to another. PA-5.

Far from being arbitrary, such distinctions constitute the very essence of the balancing test; properly, the Court of Appeals should have carefully considered the public's interest in each specific sort of document.

III.

There remains an even more salient basis upon which to distinguish the facts in this case from those found in *Miller*. The card which Miller destroyed showed that he had been classified I-A. Miller was subject to an immediate order to report for induction. Petitioner Cornell has been and remains classified I-O. Petitioners Edelman and Lisker have been and remain classified IV-F. PA-5. For various reasons, the Selective Service System has already determined that these men would not be inducted.

Since there is no reasonable ground for anticipating that appellants will be called for induction, what legitimate governmental end is served by punishing them for destroying certificates? Under what circumstances will it ever matter whether or not they have destroyed their certificates? Perhaps fanciful circumstances might be imagined under which retention of the cards might make some small difference, but the balancing test demands more than fancy.

This argument also was rejected by the court below:

> [T]he Selective Service System might be just as interested in knowing who is not subject to call at a time of emergency as it would be in knowing who is subject to call. PA-5.

It is obvious that the destruction of a certificate in no way increases or diminishes or in any way affects what the

System knows about its registrants. It is equally obvious that the intent which the Court of Appeals attributes to the Selective Service System could be as easily satisfied by making possession a requirement only of those who are eligible.

The question, which the Court of Appeals failed to discuss, is whether the utility of these cards to the System is sufficient to justify a diminution of First Amendment rights. Petitioners argued that because of their draft ineligible classifications, the cards were of minimal utility, at best, to the System. The Court's opinion fails to reveal any utility attributable to the carrying of cards.

If petitioners be required to preserve these certificates without reference to any utility such certificates possess, then these cards have, in truth, been transmuted into a kind of identity card, some sort of domestic passport, like the degrading and odious passbooks that South Africa requires black Africans to carry. Such a pointless requirement is no valid basis for diminishing the area protected by the First Amendment. Petitioners are too far removed from the working range of the Selective Service System for there to be any basis for punishing them for the destruction of the very documents which, in effect, declare them to be removed from the population of central concern to the Selective Service System.

Petitioners grant that no classification is immutable. It is true that a person classified 4-F could be summoned for re-examination, and reclassified I-Y or even I-A. It is also true that Congress could alter the basis upon which a conscientious objector is defined. But any change in classification which might bring any of these petitioners within

the range of potential draftees would involve a reclassification, and the necessary issuance of a new Notice of Classification. Thus, even should any petitioner ever be inducted, it would make no difference that he had once destroyed a certificate which declared him to be ineligible for induction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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